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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-917

RAY J. BERAN,
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion and judgment of the court of appeals (App. A, *infra*, pp. 1a-7a) is reported at 580 F.2d 324. The Memorandum and Order of the district court (App. C, *infra*, pp. 9a-11a) is not reported.

JURISDICTION

The opinion and judgment of the court of appeals was entered on July 24, 1978. A timely petition for rehearing was denied on August 29, 1978 (App. B, *infra*, p. 8a). On

November 18, 1978, Mr. Justice Blackmun entered an order extending until December 8, 1978, the time within which this petition may be filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who was not advised of the risks inherent in joint representation of defendants by a single attorney and did not waive his Sixth Amendment right to independent counsel at his federal criminal trial, bears the burden on a petition for post-conviction relief of proving that such joint representation prejudiced his defense.

2. Whether the petitioner was deprived of the effective assistance of counsel at his trial for misapplication of bank funds where his retained counsel (1) represented multiple defendants without advising the petitioner of the potential for conflict of interest; (2) failed to move for a mistrial or to file a timely motion for a new trial based on the admission at the trial of substantial, highly prejudicial evidence that was irrelevant to the counts submitted to the jury; (3) failed to interview witnesses in advance of trial or adequately to prepare the defense; and (4) drank so heavily during the trial that his judgment could not fail to have been affected.

STATEMENT

The petitioner, Ray J. Beran, was convicted by a jury in January, 1976, on four counts of misapplication of bank funds, 18 U.S.C. § 656. He was sentenced to probation and to pay a fine of $3,000.00. Following affirmance of the conviction on appeal, the petitioner moved pursuant to 28 U.S.C. § 2255 to set aside the conviction on the ground of ineffective assistance of counsel. The petition was denied,

after an evidentiary hearing, and the judgment was affirmed by the United States Court of Appeals for the Eighth Circuit. This petition seeks review of the decision of the court of appeals.

The indictment, returned in April 1975 in the United States District Court for the District of North Dakota, named both the petitioner and Andrew M. Kaminski in multiple counts under 18 U.S.C. § 656. The primary count of the indictment was Count I, in which Beran and Kaminski were jointly charged with converting to their own use some $482,000 obtained from the sale of stock of a North Dakota bank which the government claimed rightfully belonged to the bank. Of the remaining eleven counts, Beran was charged in three, Kaminski in four, and the two were jointly charged in four. Each of the counts charged that various relatively small transactions[1] constituted a misuse of the bank's assets for the personal benefit of the defendants.

Prior to the indictment, Beran and Kaminski jointly retained the services of James W. Heyer, a Colorado attorney, to reprsent them in connection with the criminal matter. (Tr. 6, 41-42).[2] Mr. Heyer continued to represent both de-

[1] The four counts on which the petitioner was convicted were Count 7, charging that $3,866 paid by the bank for a feedlot study was for Beran's benefit, not the bank's; Count 9, charging Beran and Kaminski with causing the bank to pay a lawyer $1,000 for services rendered to them personally; Count 10, charging both defendants with withdrawing $12,000 from an insurance agency owned by the bank; and Count 12, charging that $1,576 of Beran's expenses reimbursed by the bank were personal rather than bank-related.

[2] The symbol "Tr." refers to the transcript of the hearing on the petition for relief under 28 U.S.C. § 2255, which is a part of the record now lodged in this Court. Beran and Kaminski testified at this hearing.

fendants jointly through trial and on direct appeal. The trial court did not make any inquiry of the defendants as to whether they were aware of the potential for conflict of interest inherent in the dual representation, nor did Mr. Heyer discuss the matter with the defendants or advise them that they could request to be tried separately (Tr. 16, 46, 67). The petitioner had never before been involved in, or even attended, a trial prior to his own (Tr. 15-16).

Prior to trial Mr. Heyer was given a list of government witnesses and full access to the documents in the possession of the prosecution. He did not, however, show the list of witnesses to the petitioner (Tr. 8), and did not review the government's evidence until two days before trial began (Tr. 26, 45-46, 75). He did not interview any of the government's witnesses, nor did he interview or call any of the witnesses suggested by Beran and Kaminski as persons who would be helpful to the defense (Tr. 13, 18-21, 81-84), except for character witnesses who were brought to the trial by the defendants themselves and interviewed by Mr. Heyer just prior to taking the stand (Tr. 17).

During the trial, Mr. Heyer drank heavily. He would typically have a few drinks at the noon recess rather than eating lunch; after the day's trial session, he would begin drinking and continue, on many occasions, until the early morning hours; and on many days, he would have a cocktail during the morning recess of the trial (Tr. 10-12, 47-48). He did not appear in court drunk, but the defendants had a difficult time getting him out of bed and to court on time each morning, and on some days they had to assist him in getting dressed. (Tr. 15, 47-48).

Trial commenced December 2, 1975, and the government presented 53 witnesses over a 12-day period in support of its case. Of these, 46 testified solely about the sale of

stock which was the subject of Count 1. Many of these witnesses were local farmers and ranchers who had purchased stock, mostly on the sales pitch of Kaminski. The testimony received on Count 1 tended to show that the defendants made misrepresentations to local investors, and improperly sold them bank stock using high-pressure sales tactics.

At the conclusion of the government's case, the trial judge dismissed Count 1 on the ground that the prosecution had not shown, as alleged, that the stock sold belonged to the bank rather than to the defendants. The judge also recognized, in his opinion, that "if such evidence [on Count 1] were allowed to go to the jury, it would have a substantially prejudicial impact on the jury's consideration of the other counts."[3] Nevertheless, Mr. Heyer did not move for a mistrial or for a severance of counts. And, since Count I had been dismissed, the defense never rebutted the evidence as to the stock sales.

After the ruling on the motion for judgment of acquittal on December 22, the trial recessed for the holidays. Upon the petitioner's return to Bismarck after January 1, Mr. Heyer had made no preparations for the defense (Tr. 13, 51). The defense, presented primarily through the defendants' own testimony, was based on extensive notes and suggestions which the petitioner himself wrote out during the holidays. (Tr. 13.) Mr. Heyer called no witnesses other than the defendants and several character witnesses; his explanation to the petitioner was that the witnesses suggested by Beran and Kaminski would not be effective. (Tr. 21.)

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[3] The district court's opinion on the motion for judgment of acquittal is reproduced as Appendix D, *infra*.

During closing argument, Mr. Heyer urged the jury not to return a compromise verdict, saying (T. Tr. 1173):[4] "The evidence in this case does not justify a finding on anything. But if you're going to convict them on one, convict them on eleven." After fourteen hours' deliberation over two days, the jury acquitted the defendants on Counts 2, 3, and 4, but convicted Kaminski on Count 5 – which involved the largest dollar amount of any of the 11 counts considered by the jury, and related to a loan unpaid by Kaminski at the time of trial[5] – and proceeded to convict both defendants on all the rest of the counts.

Following the trial, the defendants and Mr. Heyer traveled by automobile to Grand Island, Nebraska, where the petitioner resides. In the automobile, Mr. Heyer began to draft a motion for a new trial, which he explained had to be filed the following week. (Tr. 22, 52.) The motion was not, however, filed until more than two months later – well beyond the jurisdictional 7-day time limit provided by Rule 33, Federal Rules of Criminal Procedure. In the interim, both Beran and Kaminski attempted to reach Mr. Heyer at his home and his office, but were unsuccessful. (Tr. 23, 55-56.) Mr. Kaminski later learned that Mr. Heyer had gone to Hawaii with a friend. (Tr. 56.)

The motion for a new trial was based on the ground that the defendants had been denied a fair trial by the admission of the evidence on Count 1 – evidence which would

[4] The symbol "T.Tr." refers to the transcript of the original trial, which is included in the record lodged with this Court.

[5] All loans or payments involved in the counts on which Beran was charged had been repaid by the time of trial, except for a $7500 loan as to which Beran was acquitted.

have been inadmissible in a separate trial on the counts actually submitted to the jury, which was highly prejudicial to the defendants, and which was never rebutted by the defendants because the count to which it related was dismissed at the close of the government's case. The trial judge denied the motion for a new trial on the ground that it was untimely under Rule 33. (R. 72, 74.)[6] The judge also denied the motion for judgment of acquittal, although he stated: "The trial judge did not agree with the guilty verdicts handed down." (R. 72, p. 1.)

On direct appeal, the defendants – still jointly represented by Mr. Heyer – argued, *inter alia*, that the convictions should be reversed because of the prejudicial effect of the Count 1 evidence. The court of appeals, in an opinon reported at 546 F.2d 1316, held that since no mistrial had been requested and the motion for a new trial had not been timely filed, the question presented was only whether the trial court should have ordered a mistrial on its own motion, and that in such circumstances, the Double Jeopardy Clause of the Fifth Amendment requires a showing of "imperious" or "manifest necessity" for doing so. 546 F.2d, at 1319 n.2. By that standard, the court of appeals rejected the argument and affirmed the conviction, while observing that "the matter is not free from doubt." *Id.* at 1320.

Following affirmance of the conviction and this Court's denial of a petition for a writ of certiorari, 430 U.S. 916 (1977), the petitioner – through new and independent counsel – moved to vacate the sentence under 28 U.S.C. § 2255 on the ground that he had been deprived of the

[6] The symbol "R." refers to the tab number assigned by the clerk to a particular document in the record on the petitioner's direct appeal, which is now lodged in this Court.

effective assistance of counsel. At an evidentiary hearing on the petition, Beran and Kaminski testified to the facts stated above. In addition, the witness Earl Kramer, who had known Mr. Heyer for several years and had been represented by him in litigation, testified that Mr. Heyer had a continual drinking problem and in Kramer's case, had shown an inability to complete work on time and had been severely reprimanded by the trial judge because of his failures. (Tr. 90-91.) The prosecuting attorney, David Peterson, was called by the government and testified that he had made essentially the entire government file available to Mr. Heyer in advance of trial, that Mr. Heyer and the defendants had spent the better part of the two days preceding the trial reviewing that file, and that on the basis of his observations during the trial, he believed Mr. Heyer was competent. (Tr. 94-95.)

The trial judge denied the petition. Overlooking petitioner's claim based on his joint representation, the court's order asserted that the thrust of petitioner's arguments was "twofold." First, with regard to counsel's drinking and lack of trial preparation, the court found that counsel "did inform himself," "made full use of the capabilities and information presented by his clients," and made "judgmental decisions" concerning witnesses which were not "clearly erroneous." Second, with regard to petitioner's contention that counsel's ineffectiveness was manifested in his failures to file motions for a mistrial or a new trial, the trial court analyzed the claim – somewhat cryptically – as the equivalent of a motion for a new trial. The court did not decide whether petitioner's representation had been constitutionally sufficient, but concluded that it "cannot say the jury erred," and "cannot say that a new trial is justified."

Petitioner appealed, and the Eighth Circuit took a different approach to petitioner's claims. The court of appeals

held that the petitioner's burden on a claim of ineffective assistance of counsel was twofold: first, to show "that there has been a failure to perform some duty . . . owed by a defense attorney to his client," and second, to show that "that failure prejudiced his defense." 580 F.2d 324, 326; App. A, *infra*, at p. 2a. The court then discussed separately what it apparently felt to be five independent claims of ineffective assistance of counsel.

With regard to Mr. Heyer's joint representation of the petitioner and Kaminski, the court noted that there was no question of waiver of the right to separate counsel since the defendants "were not informed of that right or of the potential for conflicts of interest inherent in dual representation," but it held that no deprivation of the right exists unless "an actual conflict of interests or a substantial possibility of conflict existed . . ." *Id.* at 326. The court found that the record in this case does not establish "even a minimal showing" of such a conflict. For similar reasons, the court found it was not a breach of duty for Mr. Heyer not to have requested separate trials for the defendants.

With respect to counsel's lack of preparation, the court found that Mr. Heyer did not interview government witnesses or witnesses suggested by the defendants, except for character witnesses, but noted that he had full access to the government's files, that he effectively cross-examined the government's witnesses, and that he and his clients spent "several days" examining the government's evidence prior to trial.[7] Without deciding whether counsel breached

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[7] The record, however, established that Mr. Heyer began to examine the government's evidence only two days prior to trial, and that he and his clients spent "the better part" of those two days doing so. (Tr. 94.)

his duty to the defendants by lack of preparation, the court held that the requisite demonstration of prejudice had not been made because the petitioner had not shown "what evidence would have been discovered had counsel investigated more diligently. . ." *Id.* at 327.

The court concluded that no breach of duty had been shown in counsel's failure to move for a mistrial or for severance of counts following the dismissal of Count 1 because it felt that "plausible strategic reasons existed" for bypassing such motions, and the question was "a matter of trial tactics and strategy" which should not be "second guessed by a reviewing court." *Id.* The failure to file a timely motion for a new trial, on the other hand, was "simply negligent" and "a clear breach of duty" by counsel. *Id.* at 328. The court reasoned, however, that since no motion for mistrial or severance of counts had been made when Count 1 was dismissed during the trial, the issue when raised on a motion for a new trial would have to be decided under the "plain error" doctrine; and this question had been raised and decided against the petitioner on direct appeal from the convictions. Thus, the court held, the likelihood of success of the new trial motion was "remote," and no actual prejudice resulted from counsel's breach of duty.

Finally, the court concluded that the evidence of counsel's excessive drinking during the trial was not sufficient, in view of the lack of complaints by the defendants during the trial and the lack of any demonstration that counsel was affected in his trial performance by his consumption of alcohol, to show either a breach of duty or prejudice.

REASONS FOR GRANTING THE WRIT

1. This petition asks the Court to decide who bears the burden of showing the existence or lack of prejudice, and the standard by which such proof should be tested, when multiple defendants in a federal criminal trial have been jointly represented by a single attorney. The issue is one that, in the absence of guidance from this Court, has divided the Circuits and continues to bedevil the lower courts.

Just last Term, in *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978), this Court concluded that "whenever a trial court has improperly required joint representation over timely objection reversal is automatic." No showing of specific prejudice was required because of the difficulty of assessing the impact of a conflict between the interests of jointly-represented defendants on the wide range of choices made by their attorney at every stage of a criminal proceeding. *Id.* at 489-91. The Court pointed out that the Courts of Appeals were divided on two related issues that it reserved in *Holloway* – whether, when no explicit objection to joint representation has been lodged, a trial court has an affirmative obligation to intervene to guard the Sixth Amendment rights of co-defendants and how great a degree of conflict or prejudice must be shown to warrant relief from a conviction. *Id.* at 483.

These issues are squarely presented by this case. As the court below noted, petitioner was not informed – either by his counsel or the court – of his right to separate counsel or of the potential for conflicts of interests inherent in dual representation. 580 F.2d at 326, App. A, *infra*, at 2a. Nonetheless, the Eighth Circuit adhered to the standard it had articulated in *United States v. Lawriw*, 568 F.2d 98 (8th Cir. 1977), placing the burden on petitioner to demonstrate "an

actual conflict of interests or a substantial possibility of conflict." 580 F.2d at 326.

In *Lawriw*, the Eighth Circuit adopted a rule requiring, in every case where co-defendants are jointly represented, that the district court conduct a "meaningful inquiry" into the propriety of the representation. The trial court must address the defendants personally, fully inform them as to the potential danger of dual representation, and afford them the opportunity to respond and solicit further information. However, having placed its district courts under a duty of inquiry, the Eighth Circuit declined to attach any consequences to a trial court's failure to perform. Parting company with at least two other Circuits and the Minnesota Supreme Court, the Eighth Circuit concluded that even if a district court has failed to take the required steps to protect the rights of jointly represented co-defendants, and there is no other basis for finding a waiver of the right to independent representation, a defendant must still bear the burden of proving that his defense suffered from the effects of a potential conflict of interest. And in this case, it applied this rule to petitioner, a layman who was participating in his first criminal proceeding without any guidance from any source as to the risks inherent in joint representation.

The First and Second Circuits and the Minnesota Supreme Court have held that a trial court's failure to conduct a colloquy into the propriety of joint representation shifts the burden to the government to prove that co-defendants have *not* been harmed by conflicts of interest. *United States v. Foster*, 469 F.2d 1, 4-5 (1st Cir. 1972); *United States v. Donahue*, 560 F.2d 1039 (1st Cir. 1977); *Salomon v. LaVallee*, 575 F.2d 1051 (2d Cir. 1978); *United States v. DeBerry*, 487 F.2d 448, 453-54 n. 6 (2d Cir. 1973); *State v. Olsen*, 258 N.W. 2d 898 (Minn. 1977). Moreover, the D.C. and Third Circuits have adopted the substantial equivalent

by requiring only slight showings of conflict and prejudice where no intelligent waiver of the right to separate counsel appears on the record. *See Campbell v. United States*, 352 F.2d 359, 361 (D.C. Cir. 1965); *Lollar v. United States*, 376 F.2d 243, 247 (D.C. Cir. 1967); *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 210 (3d Cir. 1973). In *Lollar*, the court held, quoting in part from earlier decisions: "only where '"we can find no basis in the record for an informed speculation" that appellant's rights were prejudicially affected,' can the conviction stand." 376 F.2d at 247.

In *United States v. Lawriw, supra*, the Eighth Circuit declined to adopt the burden-shifting principle, although the court conceded that "there is much to commend it." 568 F.2d at 105. In this holding, the Eighth Circuit is in agreement with five other Circuits, although there is disagreement even among these Circuits as to the specificity of the showing of prejudice that is required. The Fifth Circuit has held that the defendant "must show that he was prejudiced as a result of this joint representation," *United States v. Smith* 550 F.2d 277, 286 (5th Cir. 1977), although where there exists an "actual conflict of interest," as opposed to a "hypothetical or speculative" conflict, then no further showing of prejudice is required. *United States v. Alvarez*, 580 F.2d 1251, 1260 (5th Cir. 1978). The Seventh Circuit, like the Eighth, has explicitly declined to follow the First and Second Circuits in shifting the burden on the question of prejudice to the government, and has required the defendant "to demonstrate, with a reasonable degree of specificity, that a conflict of interests actually existed at trial." *United States v. Mandell*, 525 F.2d 671, 677 (7th Cir. 1975). A similar rule is followed in the Fourth Circuit, *United States v. Atkinson*, 565 F.2d 1283, 1284 (4th Cir. 1977) (defendant must show "some specific instance of pre-

judice, some real conflict of interest"), and the Sixth Circuit, *United States v. Woods*, 544 F.2d 242, 268-269 (6th Cir. 1976) ("Our court requires a party claiming that joint representation resulted in a conflict of interest to demonstrate that some actual prejudice resulted to him").

The shift in the burden of proof in the First and Second Circuits – and the minimal showings of prejudice required in two other Circuits – reflect these courts' attempts to take account of the special character of any claim by a jointly represented defendant that he has been deprived of the effective assistance of counsel. As this Court recognized in *Glasser v. United States*, 315 U.S. 60, 76 (1942), the denial of the undivided efforts of counsel is an error of special significance:

> "The right to have the assistance of counsel is too fundamental and absolute to allow the courts to engage in nice calculations as to the amount of prejudice arising from its denial."[8]

Indeed, because conflicts of interest can pose such a fundamental threat to the fairness of criminal proceedings, some courts have ordered the appointment of new counsel over the objection of a defendant. *United States v. Bernstein*, 533 F.2d 775, 787-89 (2d Cir. 1976); *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978). *But cf. United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). "The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney." *United States v. Carrigan*, 543 F.2d 1053, 1058 (2d Cir. 1976) (Lumbard, J., concurring).

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[8] In *Holloway*, this Court stated (98 S. Ct. at 1181; quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)):

> "The assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'"

On a practical plane, the imposition of a duty on the district judge to conduct a careful colloquy with jointly-represented co-defendants is the only workable means of assuring defendants the effective assistance of counsel whose loyalty is undivided. This approach guarantees that most disputes concerning the constitutional adequacy of joint representation will turn on whether the defendant's on-the-record statements amount to a waiver of his Sixth Amendment rights. It thus avoids, in most cases, the necessity of a post-trial inquiry by a reviewing court into, in the languge of *Glasser v. United States, supra*, "nice calculations as to the amount of prejudice" resulting from the joint representation.

The Eighth Circuit in its *Lawriw* decision recognized these considerations in announcing a requirement that the district judge make appropriate inquiries of jointly-represented defendants, but in requiring a defendant *not* so advised by the district judge to demonstrate an actual or substantial likelihood of a conflict of interests, it placed an unfair burden on the defendant and failed to provide any incentive for the government, in cases where defendants are jointly represented, to ensure that they are appropriately advised by the Court.

The burden is unfair because the record of a criminal proceeding rarely reflects the damage to a defendant's substantial rights that has resulted from an improper joint representation. The record will not show what discretionary

choices a defendant might have made before or during trial, or what evidence might have been developed or trial strategies pursued had the defendant had the benefit of counsel committed entirely to his interests. As this Court observed in *Holloway v. Arkansas, supra,* 435 U.S. at 489-490, joint representation "is suspect because of what it tends to *prevent* the attorney from doing." (Emphasis added.) The record at trial "may not reveal the whole story; apparently minor instances in the record which suggest co-defendants' conflicting interests may well be tell-tale signs of deeper conflict." *Lollar v. United States, supra,* 376 F.2d at 246-47. A trial transcript suggesting that a single attorney has presented a reasonably effective – if unsuccessful – unified defense on behalf of two defendants will not indicate whether one defendant was denied a more promising separate defense because of counsel's divided loyalty. *See United States ex rel. Horta v. DeYoung,* 523 F.2d 807, 809 (3d Cir. 1975); *People v. Chacon,* 69 Cal. 2d 765, 73 Cal. Rptr. 10, 447 P.2d 106 (1968) (Traynor, C.J.).

On the other hand, when the trial court has failed to give a co-defendant sufficient information to enable him to make an intelligent choice concerning joint representation, it is entirely proper to require the prosecutor to negate the possibility that the defendant has been harmed. This shift in the burden of proof gives the prosecutor an incentive to intervene to prepare a proper record on co-defendants' decision in favor of joint representation. When such a record has not been made and a trial has taken place, the prosecutor will be in at least as good a position to demonstrate lack of conflicting interests as the defendant would be to demonstrate that such conflicts actually existed. Shifting the burden to the government will produce a different result, of course, when the record does not clearly establish either an actual conflict or the absence of any conflict;

but given the critical importance of independent counsel in a criminal trial guided by no loyalties other than to his individual client, that is precisely the situation in which the defendant should be granted a new trial.

The facts of this case amply demonstrate that the government did not meet the burden of showing lack of prejudice; indeed, the petitioner's showing of prejudice was plainly sufficient to meet the standards of all but the most demanding Circuits. The charges made in the indictment and the surrounding circumstances were suggestive of a possible conflict between Beran and Kaminski. Of the counts that the trial court allowed to go to the jury, the two most serious, in terms of the sums involved, were directed at the petitioner's co-defendant alone.[9] Unlike his co-defendant, the petitioner had, by the time of trial, reimbursed the bank for all but one of the outlays that were the subject of the indictment. Finally, with regard to Count 1, the alleged misappropriation of $482,000 in proceeds from the sale of bank stock, the evidence showed that petitioner's co-defendant was "primarily" responsible for the sales and unlike petitioner, had made use of high-pressure sales tactics that were highly visible indicia of bad faith.

These differences between the two defendants were of critical importance. Neither defendant denied that the transactions which were the subject of the indictment had taken place. Accordingly, the pivotal issues for the jury were whether these transactions amounted to a "misapplication" of bank funds, 18 U.S.C. § 656, as opposed to mere maladministration, and whether each defendant had had the requisite intent to defraud the bank. *See United States v. Beran,*

[9] Counts 2 and 6 charged that the co-defendant had procured self-dealing loans of $20,000 and $47,000 respectively. By contrast, no count directed at petitioner alone involved more than $7,500.

546 F.2d 1316, 1320-21 (8th Cir. 1976). There being no admission by either defendant of a criminal state of mind, the government had to argue that the jury should infer bad faith from the defendants' conduct. On this score, the government's position was hardly overwhelming. The trial court was later to remark that he "did not agree with the guilty verdicts handed down."

Under these circumstances, there was little to be gained from a "unified defense." The petitioner's best opportunity for an acquittal may well have been to focus the jury's attention on those circumstances which tended to negate an intent to defraud on his part. Unfortunately, counsel could not pursue this strategy without highlighting the aggravating circumstances of the co-defendant's conduct. The result was that both defendants were forced to "sink or swim" together. In what we submit was a vivid illustration of the subtle but highly damaging effect that counsel's joint representation had on his ability effectively to represent the petitioner, counsel went so far in his closing argument as to suggest that the jury should not consider seriously acquitting one defendant and convicting the other (T. Tr. 1172-1173):

> "You are going to be told by the Court that you have to consider each count separately and each Defendant separately and weigh each count. I say to you do not compromise your verdict. Do not say that you're going to give the Government something and give us something. . . . [I]f you're going to convict them on one, convict them on eleven."

On these facts, the government plainly could not have met the burden of showing that petitioner was not harmed by a conflict of interest. This case squarely raises the question of the proper allocation of the burden of proof and the

standard by which a prejudicial conflict of interest is to be measured, and in view of the serious conflicts among the Circuits on this issue and its importance to the administration of criminal justice in the federal courts, this Court should grant certiorari.

2. In considering the petitioners' claims of ineffective assistance of counsel other than the joint representation claim, the court of appeals applied what we submit was an entirely appropriate standard – namely, whether counsel "failed to perform some duty . . . owed by a defense attorney to his client," and whether if so "that failure prejudiced his defense." 580 F.2d 324, 326; App. A, *infra*, p. 2a. That being the case, the second question presented by this petition does not involve the sort of conflict on a rule of law which generally provides the basis for an exercise by this Court of its certiorari jurisdiction. We submit, however, that the court of appeals demonstrably erred in its application of the law to this case, and that the matter at issue – the level of competence and professionalism that the federal courts will require of the criminal defense bar – is one of unquestioned public interest as well as of importance to the administration of justice. Under these circumstances, this Court should grant the petition on this issue as well as the question of joint representation.

The specific failures of defense counsel that resulted in demonstrable prejudice to the petitioner in this case were his failure to move for a mistrial at the close of the government's case or to file a timely motion for a new trial. To understand the impact that these failures had upon the result of the case requires an appreciation of the issue that, because of counsel's neglect, was never decided by the trial judge.

The government's case-in-chief at the petitioner's trial took twelve days to present. Eight of those days – and 46 of the government's 53 witnesses – were concerned with Count 1 of the indictment. With this evidence, the government attempted to prove in essence that petitioner and his co-defendant had set out to swindle a number of small investors in the area where the case was tried by selling them an unauthorized issue of bank stock and misappropriating the proceeds. At the close of the government's case, the trial court entered a judgment of acquittal on this count, holding that the "overwhelming evidence" was that the investors had purchased stock owned by the co-defendants – not shares owned by the bank.

In granting a judgment of acquittal, the trial court explicitly found that allowing the Count 1 evidence to go to the jury "would have a substantially prejudicial effect on the jury's consideration of the other counts." App. D, *infra*, p. 20a.[10] The trial court's concern was fully justified. While the government's proof did not make out the criminal offense charged in the indictment, it did suggest that the defendants had engaged in questionable sales practices involving a large risk of loss to sympathetic small investors, and given the overwhelming amount of time and number of witnesses devoted to this testimony, it could not fail

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[10] Unfortunately, the trial court failed to heed his own warning when he "withdrew" this evidence from the jury. Refusing to give petitioner's requested instruction, which would have required the jurors to disregard entirely the Count 1 evidence, the Court advised them only to "disregard all evidence received previously only insofar as that evidence deals only with Count 1." Unaccompanied by any indication as to what evidence was being referred to and what specific limits were being imposed on its use, this instruction left the jury free to draw its own conclusions from the Count 1 evidence. (T. Tr. 700, 1158.)

to have fixed the jury's impression of the defendants as persons who should be punished. Because a judgment of acquittal was entered before the beginning of the petitioner's defense, the government's evidence in this regard was never effectively rebutted. Even the government recognized that this Count 1 evidence was highly prejudicial. Indeed, during argument on the extent to which the defendants could be cross-examined on Count 1 evidence, the prosecutor stated:

> "[T]here's absolutely no question I'm attempting to prejudice these defendants. . . . I intend to show that these defendants by a dishonest act entered all of that stock in their own name rather than in the investors. . . . [I]t speaks to their truthfulness in dealing with the Bank."[11]

Petitioner's counsel failed to move for a mistrial following the entry of the judgment of acquittal on Count 1. He also failed to file a motion for a new trial until more than two months after the guilty verdicts – well beyond the seven-day period specified in Rule 33, F. R. Crim. P. Although he had begun to prepare the motion immediately after the trial had ended, counsel failed to complete it before leaving for Hawaii without contacting his clients. Because of the motion's unexcused late filing, the trial court did not even have the power to grant a new trial.[12]

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[11] The use of evidence of "other acts" in this indiscriminate manner – to demonstrate that a defendant has a dishonest disposition – is flatly prohibited by Rule 404(b), *F.R. Evid.*

[12] Rule 33 was amended in 1967 to make it unmistakably clear that a judge may not grant a new trial on his own motion. 8A *Moore's Federal Practice* ¶33.01 (1978 ed.).

In the lower courts, the petitioner cited the failure of counsel to file timely motions for a mistrial and a new trial as being among the circumstances establishing a denial of his Sixth Amendment rights. Considering each of these failures in isolation from other circumstances casting doubt on the quality of counsel's performance, the Court of Appeals found that neither amounted to a denial of the effective assistance of counsel.

The Eighth Circuit described counsel's failure to file a motion for a new trial as "simply negligent." 580 F.2d at 328, App. A, *infra*, p. 6a. Nonetheless, the court held that counsel's "clear breach of duty" did not entitle the petitioner to relief from his conviction, concluding that the petitioner had not demonstrated any "actual prejudice" resulting from counsel's misconduct. The panel stated that because counsel had failed to move for a mistrial after the entry of judgment on Count 1, any motion for a new trial would have been judged by the same standard applicable to the declaration of a mistrial by a trial court *sua sponte*. Adverting to the decision on direct appeal that the trial court did not err in failing to grant a mistrial on its own motion, the court below concluded that even a timely motion for a new trial would have had only a "remote" chance of success.

This reasoning rests on a fundamental misconception concerning the standards governing new trial motions. When a trial court is deciding whether to declare a mistrial *sua sponte*, its freedom of action is limited by the Double Jeopardy Clause of the Fifth Amendment. Only if the mistrial is compelled by "manifest necessity" will the defendant be subject to retrial. *Arizona v. Washington*, 434 U.S. 497 (1978); *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Jorn*, 400 U.S. 470 (1971). Relying on this "manifest necessity" standard, the Eighth Circuit properly concluded – on direct appeal of petitioner's conviction – that it was not error to fail to declare a mistrial *sua sponte*. 546 F.2d at 1319-20 & n.2.

However, a totally different standard would have been applicable to a timely motion for a new trial. By filing such a motion, a defendant waives any right to object to a second trial. Accordingly, a new trial may be granted "if required in the interest of justice," Rule 33, *F. R. Crim. P.*, without reference to the stringent "manifest necessity" rule. As the Eighth Circuit itself has recently recognized, the Rule 33 standard enables a trial court to exercise "sound discretion" in deciding whether a new trial is needed. *United States v. Boberg*, 565 F.2d 1059, 1062 (8th Cir. 1977).[13]

It is clear that the Eighth Circuit was flatly wrong when it concluded that a timely motion for a new trial would have been judged by the "manifest necessity" standard applicable to mistrial declared *sua sponte*. Consequently, the petitioner did suffer prejudice resulting from counsel's "clear breach of duty." He lost forever the opportunity to have the trial court exercise its discretion as to whether the petitioner should receive a trial free of the taint of the Count 1 evidence. Moreover, the harm to the petitioner was more than just hypothetical. The trial court had already indicated its awareness that the Count 1 evidence was highly prejudicial, and was later to state that it did not agree with the guilty

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[13] An appellate court, by contrast, is not well situated to pass on a new trial motion. Its only function is to ascertain whether an abuse of discretion has occurred. *Holt v. United States*, 218 U.S. 245, 251 (1910); *United States v. Reese*, 561 F.2d 894, 902 (D.C. Cir. 1977).

verdicts. The Court of Appeals had no basis, therefore, for discounting the substantial possibility that a timely new trial motion would have been granted.

The court of appeals took a different but equally erroneous view of petitioner's claim that his attorney should have filed a motion for a mistrial after Count 1 had been removed from the case. The court's conclusion that the failure to file such a motion was not an indication of ineffective assistance of counsel rested on the following grounds (580 F.2d at 327):

> "Plausible strategic reasons existed for bypassing the motions for severance or a mistrial . . . . [C]ounsel could reasonably have concluded that it was better to continue with the case, which was was almost at a close, that to begin the trial again with a new jury."

In short, the court of appeals assumed that counsel exercised careful professional judgment and relied on hypothesized "plausible strategic reasons" in declining to file a motion for a mistrial.

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[14] Moreover, in his opinion on the motions for judgments of acquittal made at the close of all of the evidence, the trial court indicated that petitioner's case was "interesting" because it illustrated the different standards applicable to motions for judgments of acquittal under Rule 29, F.R.Crim.P., and new trial motions under Rule 33. Describing himself as "bound" by the more stringent standard associated with Rule 29, he denied petitioner's timely motion for a judgment of acquittal. (R. 72.) The implication was that he might well have been disposed to grant a timely new trial motion.

In the usual case, there is good reason for an appellate court to refuse to second-guess decisions by counsel to forego motions or defenses. When there is no suggestion that an attorney has done less than his best on behalf of a client, a court may justifably assume that a decision seeming in retrospect to have been ill-advised was nonetheless based on the attorney's *bona fide* contemporaneous assessment of the defendant's interests. *See, e.g., McMann v. Richardson,* 397 U.S. 757, 770-71 (1970). The situation is entirely different, however, when an attorney has demonstrably neglected his client's interests in significant respects. Such a showing destroys the basis for an assumption that questionable decisions by counsel are based on "plausible strategic reasons" – as opposed to incompetence or neglect.

The Eighth Circuit was thus in error in judging counsel's failure to file a motion for a mistrial apart from other circumstances casting doubt on his judgment. Had it viewed counsel's inaction in context, it could not have assumed that counsel had based his decisions on tactical considerations. The same attorney had, in the same case, failed to warn his clients of the dangers of joint representation,[15] neglected to interview witnesses, spent just two days reviewing the government's evidence (which took twelve trial days to present), relied entirely on a defense prepared by the petitioner, and drank so heavily during trial that his clients had to get him out of bed and dress him. It is patently unreasonable for a court of appeals to presume that a lawyer who conducted himself in this manner, and who had "negligently" failed to

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[15] A careful approach to joint representation is an important aspect of competent representation. *E.g., United States ex rel. Hart v. Davenport,* 478 F.2d 203, 210 (3d Cir. 1973) ("Normal competency includes, we think, such adherence to ethical standards with respect to avoidance of conflicting interests as is generally expected from the bar.")

file a motion for a new trial, must have been acting tactically in failing to move for a mistrial.

Viewed in this light, the failure to file a motion for a mistrial surely amounted to a denial of the effective assistance of counsel. Forty-six Count 1 witnesses testified that the petitioner and his co-defendant had engaged in a variety of misconduct threatening the interests of a bank and numerous small investors. Only a limited amount of this evidence could even arguably have been admitted in a separate trial on the remaining counts – which involved various unrelated transactions.[16] It strains credulity to suggest that effective counsel would not have moved to try these minor counts before a jury that had not been exposed to the de-

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[16] The government argued below that "most of this evidence" would have been admissible in a second trial – without specifying its theory. Some Count 1 evidence might plaus.bly have been probative of the defendants' alleged intent to defraud the bank, see Rule 404(b), *F.R.Evid.* But surely the trial court would not have concluded that the testimony of all forty-six Count 1 witnesses – or a large number of them – would be probative and not overly prejudicial. See Rule 403, *F.R. Evid.* No extrinsic evidence of these "other acts" would have been admissible to contradict the defendants' character witnesses. Rule 608(b), *F.R. Evid.*

The government also argued strenuously that petitioner and his counsel could reasonably have feared that the declaration of a mistrial might have resulted in a government appeal and reinstatement of Count 1. However, "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

tails of this alleged massive fraud.[17] Counsel's failure to file such a motion was just one more tile in the mosaic of his ineffective performance and the lower court had no basis for attributing his neglect to tactical concerns. This Court should not, we submit, tolerate the conclusion that this performance was a satisfactory fulfillment of the guarantee of effective counsel to a defendant in a federal criminal trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[17] In contrast to its treatment of the new trial motion, the Eighth Circuit did not suggest that a timely motion for a mistrial would have been futile. To the contrary, the panel hearing the petitioner's direct appeal indicated that the question whether the trial court should have acted *sua sponte* – notwithstanding the stringent "manifest necessity" standard – was "not free from doubt." 546 F.2d at 1320.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1843

Ray J. Beran,
Appelant,
v.
United States of America,
Appellee.

No. 77-1872

Andrew M. Kaminski,
Appellant,
v.
United States of America,
Appellee.

Appeals from the United States District Court for the District of North Dakota.

Submitted: March 14, 1978
Filed: July 24, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge, HENLEY, Circuit Judge, and LARSON, Senior District Judge.*

* The Honorable Earl R. Larson, United States Senior District Judge, District of Minnesota, sitting by designation.

LARSON, Senior District Judge.

Ray J. Beran and Andrew M. Kaminski were convicted of several counts of misapplication of bank funds. The convictions were affirmed on appeal, *United States v. Beran*, 546 F.2d 1316 (8th Cir. 1977). Petitioners filed applications for relief under 28 U.S.C. § 2255 alleging that their retained counsel's assistance at trial was ineffective. The district court denied the motions after an evidentiary hearing and these appeals followed. The details pertaining to the case are set out in our previous opinion; it is sufficient to note here that petitioners were charged individually or together with twelve counts of misapplying bank funds. A judgment of acquittal on Count I, on which both were charged, was entered at the close of the government's case and the remaining counts went to the jury. The jury acquitted each defendant on some counts and convicted on others. Both were fined and placed on probation.

The standard for determining the adequacy of counsel in this context is whether the defense attorney "exercise[d] the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976). The evaluation is a two step process: "first, determining . . . whether there has been a failure to perform some duty . . . owed by a defense attorney to his client; and second, determining . . . whether that failure prejudiced his defense." *McQueen v. Swenson*, 498 F.2d 207, 218 (8th Cir. 1974). We will examine each of the claimed instances of ineffective assistance separately.

Petitioners were jointly represented by one attorney and they now claim this joint representation was impermissible. Waiver of the right to separate counsel is not at issue, for petitioners were not informed of that right or of the potential for conflicts of interest inherent in dual representation. *See United States v. Lawriw*, 568 F.2d 98 (8th Cir. 1977). In this circuit, however, joint representation is not a per se constitutional violation, *United States v. Lawriw, supra*, at 103; the question is whether an actual conflict of interests or a substantial possibility of conflict existed, *United States v. Valenzuela*, 521 F.2d 414, 416 (8th Cir. 1975). While we have suggested that the evidence of such conflict need only be "minimal," on this record we cannot say that even a minimal showing has been made. Petitioners have not pointed to a single instance before, during, or after trial when they were in positions adverse to one another. Both denied their guilt and neither fixed any blame on the other. Both testified and their testimony was similar and consistent. Their theories of defense were the same. No suggestion has been made that any other, perhaps incompatible, defenses existed or that any witnesses possessed information harmful to one and helpful to the other, so that counsel's examinations were hampered by divided loyalties. The specific point petitioners advance as evidencing a conflict is that the charges against Kaminski were more serious than those against Beran. Although there was a difference in the dollar amount each defendant was charged with misapplying and in the amounts repaid, we see no great disparity in the "gravity" of the wrongdoings involved. Moreover, even assuming the disparity was significant, petitioners have not suggested how that could affect or did affect counsel's trial tactics. In short, this case is unusually free of any indicia of divergent interests of the two petitioners and we find the argument without merit.

In a related vein, the petitioners argue that at least their counsel should have requested a severance of the two petitioners before trial to avoid potential prejudice to one by the admission of evidence relevant only to charges against

the other. But the petitioners were properly joined in the first instance and mere quantitative inequality in the evidence presented is not grounds for severance. *United States v. Jackson*, 549 F.2d 517, 526 (8th Cir. 1977). The evidence was easily compartmentalized as to each petitioner and the likelihood of confusion slight. The verdicts demonstrate that the jury considered each defendant separately. We do not view failure to move for a severance under these circumstances as a breach of the attorney's duty and, in any event, find no prejudice resulted from the joint trial.

Defendants also assert that counsel failed adequately to prepare for trial. He apparently did not interview government witnesses or witnesses suggested by his clients. The only witnesses he had contact with were character witnesses presented on defendants' behalf whom he interviewed just before they took the stand. We note, however, that counsel had full access to government files and numerous contacts with the United States Attorney's Office. He and his clients spent several days examining the government's evidence. Counsel effectively cross-examined government witnesses and succeeded in getting the most complex and serious of the charges dismissed. But assuming that the lack of further investigation here was a breach of duty, petitioners must still show that some prejudice flowed from the breach. They must demonstrate "the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial." *McQueen v. Swenson, supra* at 220. With regard to government witnesses, defendants assert they would have liked to have interviewed them and "refresh their memories" and get them to "tell the truth." They have not indicated in what respect the government's witnesses' memories were faulty or how their testimony was less than

truthful. Similarly, petitioners have mentioned the names of several people who could have testified to various counts and have stated that in their opinion the testimony would have been "beneficial." They have not, however, indicated what the testimony would have been, how it could have been used, or what specific facts could have been elicited. Presented only with petitioners' conclusory assertions and lacking any clue as to what evidence would have been discovered had counsel investigated more diligently, we can only conclude that the burden of showing prejudice has not been met.[1]

Petitioners complain of their counsel's failure to move for a severance of the counts or a mistrial after the acquittal on Count I was entered or for a new trial after the verdicts were in. The principal ground for these motions would have been that the evidence on Count I was so prejudicial that the jury could not disregard it in their deliberations on the other counts even though instructed to do so. This same question of prejudice was raised on direct appeal. *United States v. Beran, supra.* Decisions to make motions such as these are a matter of trial tactics and strategy and will not generally be second guessed by a reviewing court. Plausible strategic reasons existed for bypassing the motions for severance or a mistrial. Some of the Count I evidence would have been admissible in a separate trial on the remaining counts and counsel could reasonably have

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[1] Petitioners asserted various other claims related to preparation and investigation by defense counsel. We see no need to discuss these claims in much detail. Both assert they were not kept well informed and that they do not feel their attorney had sufficient grasp of the law and the facts of the case beforehand. The record shows, however, that defense counsel and both defendants discussed the case after each day's session. There is ample evidence that counsel did not try the case "cold," as the transcript reveals a thorough knowledge of both the law and the facts related to the charges.

concluded that it was better to continue with the case, which was almost at a close, than to begin the trial again with a new jury. Indeed, trial counsel deliberately used the "disappearance" of Count I in his final argument to convince the jury that accusations do not necessarily indicate guilt or wrongdoing.

The failure to move for a new trial, on the other hand, was simply negligent. Counsel began making notes for the motion immediately after the verdicts came in and then abandoned the effort in favor of a personal vacation. He did not contact his clients again until the time for filing the motion had passed. Although we view this conduct as a clear breach of duty, we must nevertheless determine whether any actual prejudice resulted from the breach. Since counsel had bypassed motions for severance or a mistrial after Count I was dismissed, he would have had to argue the new trial motion, based on the same ground, under the plain error doctrine. The trial court would then have been in the same position as the court was on direct appeal and would have had to determine whether failing to declare a mistrial *sua sponte* after the acquittal on Count I was plain error. *See United States v. Beran, supra.* This issue was decided on direct appeal—continuing the trial after Count I was removed from the case was not erroneous. Thus, although counsel's breach resulted in defendants' being deprived of an opportunity to present a motion to the court, the likelihood of success of the motion was remote, and we conclude that no actual prejudice resulted from the failure.

Defendants have also presented evidence that their attorney consumed alcoholic beverages in what they considered to be excessive amounts during the course of the trial. Defendants did not complain of this conduct to anyone during the trial, nor did they terminate their attorney's services

on the direct appeal, long after they had discovered the habits of which they now complain. Defendants stated that counsel was not intoxicated, but they believe that he may not have functioned to his "fullest capabilities." We do not find that defendants' specific claims substantiate this charge. We have found only one instance in which a breach of duty occurred – the failure to move for a new trial – which could be construed as related to alcohol abuse, although even that is far from clear. And in that instance we have found no prejudice. As to whether counsel was affected by excessive alcohol consumption during trial, we have found no indication thereof in our examination of the trial record or of defendants' specific claims and, more importantly, the trial judge who presided over the long proceedings and was in the best position to assess such a claim, ruled against petitioners on this issue. In short, we find that defendants have failed to show both a breach of duty and prejudice on this ground, as well as on the other claims discussed.

The judgment of the district court is affirmed.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1843. September Term, 1977

Ray J. Beran, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the District of North Dakota.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

August 29, 1978

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Ray J. Beran, Petitioner,
vs.
United States of America, Respondent. — A77-1008

Andrew M. Kaminski, Petitioner,
vs.
United States of America, Respondent. — A77-1011

ORDER

Petitioners, Ray J. Beran and Andrew M. Kaminski, have each petitioned for a writ of habeas corpus pursuant to 28 U.S.C. §2255. Both Petitioners are seeking release from probationary custody imposed after their convictions for violating 18 U.S.C. §656.

The thrust of Petitioners' attack is twofold. First, Petitioners claim that their counsel was incompetent by reason of domestic problems and drinking which caused him to neglect trial preparation. Second, Petitioners claim that counsel was tactically incompetent because he did not move for mistrial or severance after Count I of the Indictment was dismissed.

These factors control my thinking: In fact, as demonstrated in the development of the case, counsel did inform himself; counsel made full use of the capabilities and information presented by his clients. Counsel made tactical decisions regarding use or nonuse of witnesses. These were judgmental decisions and I do not feel it has been proved that these judgmental decisions were clearly erroneous.

As to the problems of severance and as to the matter of the justification of the convictions, it must be remembered that the case started with four counts against Mr. Beran, four counts against Mr. Kaminski, and four counts against both Mr. Beran and Mr. Kaminski. Count 1, which was the foundation count, was dismissed by the Court. The jury at the conclusion of the evidence made a selective determination including findings of not guilty on four counts and findings of guilty on seven.

The case went to the Eighth Circuit and was returned to this Court. The Eighth Circuit in effect advising this Court that if the trial court felt a new trial was justified, it should make that decision as the Court best informed regarding what happened in the trial. *United States v. Beran,* 546 F.2d 1316 (8th Cir. 1976).

As this Court reviews the evidence on the counts that resulted in conviction, it cannot say the jury erred. Therefore, this Court cannot say that a new trial is justified. As to both matters, specifically the incompetency of counsel and the failure to move for severance or dismissal, the Court does find against the Petitioners.

IT IS SO ORDERED.

Dated at Bismarck, North Dakota, this 27th day of July, 1977.

BY THE COURT:

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE
SOUTHWESTERN DIVISION –
DISTRICT OF NORTH DAKOTA

Civil Action File No. A77-1008

Ray J. Beran,	)	
vs.	)	
United States of America,	)	Judgment
	)	File No. A77-1011
Andrew M. Kaminski,	)	
vs.	)	
United States of America,	)	

This action came on for (hearing) before the Court, Honorable Bruce M. Van Sickle, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the petition pursuant to Title 28, United States Code, Section 2255 and the relief sought therein, be and it is DENIED and that the petition is hereby DISMISSED.

Dated at Bismarck, North Dakota, this 1st day of August, 1977.

/s/ Bruce M. Van Sickle
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Ray J. Beran,	)	
Petitioner,	)	
vs.	)	A77-1008
	)	
United States of America,	)	
Respondent.	)	

Andrew M. Kaminski,	)	
Petitioner,	)	
vs.	)	A77-1011
	)	
United States of America,	)	
Respondent.	)	

ORDER

On July 28, 1977, this Court entered its order denying the relief sought by the Petitioners; pursuant thereto, judgment was filed and entered on August 1, 1977.

Now Therefore, good cause herefor appearing, it is

ORDERED that said order entered on July 28, 1977, and the judgment entered thereon on August 1, 1977, be, and the same hereby are, *vacated and set aside.* And it is further

ORDERED that counsel proceed with preparation and submission of briefs in accordance with the procedure outlined by the Court at the close of the hearing held on

July 15, except that the time for closing all briefing is extended to and until 30 September, 1977.

Bismarck, North Dakota, this 22 day of August, 1977.

/s/ Bruce M. Van Sickle,
Bruce M. Van Sickle, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Ray J. Beran, Petitioner,	)	
vs.	)	A77-1008
United States of America, Respondent.	)	

Andrew M. Kaminski, Petitioner,	)	
vs.	)	A77-1011
United States of America, Respondent.	)	

ORDER

By Order dated July 27, 1977 (filed July 28, 1977) this Court denied Petitioners' the relief they sought under Section 2255 of Title 28, U.S.C. That order and related judgment were subsequently vacated and set aside to permit further briefing. In the meantime (specifically, on August 3, 1977) the Petitioners filed a motion for new trial. Comprehensive briefs were thereafter filed by counsel for the Petitioners, which briefs have been responded to by counsel for the Respondent.

Now Therefore, the Court having reconsidered the initial 2255 motions, and having now considered the motion for new trial, together with the transcript of hearing had on

July 15, 1977 and all briefs submitted, and being well and sufficiently advised in all the premises, it is

ORDERED that the original petitions for relief under Section 2255 of Title 28, United States Code, and each thereof be, and the same hereby are, in all things, *denied;* and it is further

ORDERED that the motion for new trial be, and the same hereby is, in all things, *denied,* for the reasons stated in the order dated July 27 and filed July 28, 1977.

Bismarck, North Dakota, this 5 day of October, 1977.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge

UNITED STATES DISTRICT COURT
FOR THE
SOUTHWESTERN DIVISION
DISTRICT OF NORTH DAKOTA

Civil Action File No. A77-1008

Ray J. Beran,	)	
	)	
vs.	)	JUDGMENT
	)	
United States of America,	)	

This action came on for (hearing) before the Court, Honorable Bruce M. Van Sickle, United Stages District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the original petition for relief under Section 2255 of Title 28, United States Code is hereby in all things denied; that the motion for new trial is hereby in all things denied; and that the petition herein is hereby dismissed.

Dated at Bismarck, North Dakota, this 6th day of October, 1977.

/s/ Bruce M. Van Sickle
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	C1-75-11
vs.	)	
RAY J. BERAN and ANDREW KAMINSKI a/k/a ANDREW M. KAMINSKI, Defendants.	)	MEMORANDUM and ORDER

At the close of the Government's case, the Defendants have made Rule 29 motions for judgments of acquittal on each separate count as to which each is charged.

The applicable mandate of Rule 29 of the Federal Rules of Criminal Procedure is:

> "The court on motion of a defendant . . . shall order the entry of judgment of acquittal of one or more offenses charged in the indictment. . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

The granting of such a motion at the close of the government's case is generally not desirable, because an appellate court is denied reference to a verdict which in many cases allows a final disposition of the case on appeal. On the other hand, a defendant as to whom a motion is denied must then elect either to stand on the government's proof or put in additional evidence and thus risk curing the government's defective proof.

Another factor the Court must consider is whether allowing a patently bad count to go to the jury will subject the jury to a mass of evidence which is irrelevant to the remaining counts and prejudicial to an objective consideration of the evidence applicable to them.

In this case the government has failed to present a prima facie case as to count number one. The charge is that the Defendants, acting together, with intent to defraud, did willfully misapply monies of or entrusted to the First National Bank of Belfield, by selling an unauthorized overissue of bank stock and converting the $482,000.00 to their own use.

It is fundamental that where a charge is laid under 18 U.S.C. §656 there must be a misapplication of monies of or entrusted to the bank. *Hudson v. U.S.*, 55 F.2d 591 (8th Cir. 1932). The overwhelming evidence in this case is that the purported "over-issue" arose out of a series of stock transfers made by the owners of previously issued capital stock. The stock certificate stubs clearly showed, and the parties to the various transactions clearly understood, that they were dealing in existent shares of stock, not a new issue.

The apparent source of the language of the charge is found in the bank examiner's bookkeeping entries on the stock books (Exhibits 90 and 90A) that all certificates were not properly returned and cancelled (although they were accounted for). By simple addition of the uncancelled certificates, the examiner computed a series of "overissues."

But more than half of the three weeks of trial, and more than half of the evidentiary material is addressed to the charge in count one. Further, the government clearly realized the cumulative effect, or blending effect, of the dollar amounts involved in count one. This is demonstrated by

the summary sheet, Exhibit 140, which was denied admission because of objections raised by the Defendants.

So I conclude not only that the evidence adduced as to count one cannot sustain a jury verdict of guilty, but also that if such evidence were allowed to go to the jury, it would have a substantially prejudicial impact on the jury's consideration of the other counts.

The standard to test a Rule 29 motion is:

> "In passing on a motion for a directed verdict of acquittal, (the trial judge) must determine whether upon the evidence, giving full pay to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

Wright, *Federal Practice and Procedure*, Criminal Sec.467, citing *Curley v. U.S.*, 160 F.2d 229 (2nd Cir.), cert. den., 331 U.S. 837 (1947). Accord: *Conaway v. U.S.*, 349 F.2d 907 (8th Cir. 1965), cert. den., 382 U.S. 976 (1966).

Where, as in this case, there has been a total failure to prove a necessary element of the crime (that monies of or entrusted to the bank were involved), clearly, the motion should be granted. Where, as here, failure to grant the motion will generate prejudice, the risk of a premature grant of the motion is outweighed by the risk that prejudice will destroy the efficacy of a conviction on any of the other counts.

The motion for judgment of acquittal on count one is *granted.*

I have reviewed each of the other counts separately. I find there is some evidence to support each of the essential

elements of each of those counts. Without passing on whether there is enough evidence to meet the standard set out above, I find that the extreme risk of prejudice does not exist among these counts, since each transaction is separate and distinct. Therefore, I find that as to counts two through twelve, to grant a motion for judgment of acquittal at this time would be premature.

The Rule 29 motion for judgment of acquittal at the close of the government's case as to counts two through twelve is *denied.*

Bismarck, North Dakota, this 24th day of December, 1975.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge

Supreme Court, U. S.
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No. 78-917

In the Supreme Court of the United States

OCTOBER TERM, 1978

RAY J. BERAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 580 F.2d 324. The order of the district court (Pet. App. 15a-16a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1978. A petition for rehearing was denied on August 29, 1978 (Pet. App. 8a). On November 18, 1978, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to

and including December 8, 1978. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the representation of petitioner and his co-defendant by the same counsel was reversible error.

2. Whether counsel's failure to move for a mistrial and for a new trial constituted ineffective assistance of counsel.

STATEMENT

Petitioner and co-defendant Andrew Kaminski were tried in the United States District Court for the District of North Dakota on a 12-count indictment charging them individually or together with misapplying the funds of a federally-insured bank, in violation of 18 U.S.C. 656.

At the close of the prosecution's case, the trial court granted a defense motion for a judgment of acquittal on Count 1, which charged both co-defendants with misapplying $482,000 in bank funds by selling an unauthorized overissue of bank stocks. The court ruled that the government had failed to prove that bank funds were involved in these transactions (Pet. App. 20a). The remaining counts, however, were submitted to the jury.

Petitioner was acquitted on three counts (Counts 2, 3, and 4) and was convicted on the following four counts: Count 7, in which petitioner was charged

with causing the bank to finance a bogus feedlot feasability study and converting the bank's payments to his own use; Count 9, in which petitioner and Kaminski were charged with fraudulently billing the bank for $1,000 in legal services that were provided to petitioner and Kaminski; Count 10, in which petitioner and Kaminski were charged with converting the bank's funds by withdrawing $12,000 from the account of an insurance agency that was wholly owned by the bank; and Count 12, in which petitioner was charged with collecting from the bank for unauthorized expenses. See *United States* v. *Beran*, 546 F.2d 1316, 1321 (8th Cir. 1976), cert. denied, 430 U.S. 916 (1977).

Petitioner was sentenced to two years' probation and fined $3,000, with imposition of any additional sentences suspended. His conviction was affirmed on direct appeal, and this Court denied a petition for a writ of certiorari. *United States* v. *Beran*, *supra*.

Petitioner subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255, alleging for the first time that he was deprived of effective assistance of counsel because he and Kaminski were represented at trial by the same, jointly retained attorney, and because of various procedural errors made by this counsel. The district court denied the petition after an evidentiary hearing (Pet. App. 15a-17a), and the court of appeals affirmed (Pet. App. 1a-7a).

ARGUMENT

1. Petitioner contends (Pet. 11-19) that he was denied effective assistance of counsel because he and Kaminski had conflicting interests but were represented at trial by the same retained counsel. He urges that because the trial court did not apprise him of the dangers inherent in joint representation, the burden was on the government to "clearly establish" that he was "*not* * * * harmed by conflicts of interest" (Pet. 12, 16, 18), and he asserts that the government could not meet this burden. He also argues that the court below erred by not placing the burden of showing absence of prejudice on the government, and that its decision in this regard is in conflict with decisions of the First and Second Circuits (Pet. 12).

As this Court noted in *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978), "in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation." The courts of appeals agree therefore that joint representation is not a *per se* violation of a defendant's right to counsel. But as this Court further observed, the courts of appeals "have differed with respect to the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests" (*id.* at 483). These courts have also "differed

on how strong a showing of conflict must be made * * * before [the reviewing court] will conclude that the defendants were deprived of their right to the effective assistance of counsel" (*ibid.*).

One aspect of this divergence in views is disagreement among the courts of appeals as to which party bears the burden of showing the absence (or presence) of a conflict of interest. The courts of appeals that require a federal trial court to make a pretrial inquiry whenever defendants in a criminal trial are jointly represented by the same counsel have also held that where an adequate pretrial inquiry is not made, the burden of showing absence of conflict falls on the government. See *United States* v. *DeBarry*, 487 F.2d 448, 453 n.6 (2d Cir. 1973); *United States* v. *Foster*, 469 F.2d 1, 4-5 (1st Cir. 1972).[1] Other circuits appear to place the burden of showing conflict and prejudice on the defendant. See, *e.g.*, *United States* v. *Lawriw*, 568 F.2d 98, 105 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978); *United States* v. *Smith*, 550 F.2d 277, 286 (5th Cir. 1977); *United*

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[1] In addition, the United States Court of Appeals for the District of Columbia Circuit has held that where an adequate pretrial inquiry has not been conducted, the conviction will be affirmed only if " 'we can find no basis in the record for an informed speculation' that appellant's rights were prejudicially affected." *Lollar* v. *United States*, 376 F.2d 243, 247 (1967). This appears to relieve the defendant of the initial burden of showing prejudice, since the court will review the record for prejudice on its own initiative, and the government consequently must explain any appearances of prejudice.

States v. *Mandell*, 525 F.2d 671, 677 & n.11 (7th Cir. 1975).[2]

However, even those courts that would have placed the burden on the government to show absence of prejudice in this case[3] would agree with the Eighth Circuit here that petitioner was not denied effective assistance of counsel. As the Eighth Circuit noted, "this case is unusually free of any indicia of divergent interests of the two petitioners" (Pet. App. 3a).

Petitioner asserts (Pet. 17-18) that a conflict of interest existed because Kaminski was charged with the more serious crimes. But prejudice resulting from a joint trial with a co-defendant charged with more serious crimes is not cured by retaining separate counsel; and petitioner does not suggest how

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[2] As petitioner notes, some circuits have placed the burden of showing conflict and prejudice on the defendant but require only a slight showing. See, *e.g.*, *United States ex rel. Hart* v. *Davenport*, 478 F.2d 203, 209 (3d Cir. 1973). In *Davenport*, however, substantial conflicts existed that would have established prejudice under any standard, so the court did not have occasion to test the limits of its statement that only a possible conflict of interest, "however remote," need be shown.

[3] The First Circuit has indicated that the proper standard of review in collateral attacks on federal convictions, such as petitioner's here, is whether the government can show "unlikelihood of prejudice by a preponderance of the evidence." *United States* v. *Foster*, *supra*, 469 F.2d at 5. The Second Circuit has agreed with *Foster* that the government should bear the burden of proof, but apparently has not specified what the standard of proof should be in collateral attacks on federal convictions. See *United States* v. *DeBarry*, *supra*, 487 F.2d at 453 n.6.

any disparity in the seriousness of petitioner's and Kaminski's offenses would have affected his own trial tactics.

Petitioner further asserts that a conflict existed because defense counsel could not "negate an intent to defraud on his part * * * without highlighting the aggravating circumstances of the co-defendant's conduct." But this claim is unsupported by any explanation of the nature of these "aggravating circumstances" or how "highlighting" them would have aided petitioner. In fact, two of the four counts (Counts 7 and 12) on which petitioner was convicted charged him alone. As to the remaining two counts (Counts 9 and 10), we are unable to discern what "aggravating circumstances" in Kaminski's conduct would have tended to show that petitioner did not act with specific intent to misapply bank funds.

Petitioner did not deny that he and Kaminski caused the bank to pay $1,000 for legal services that were performed solely for his and Kaminski's benefit (Count 9). Rather, he and his co-defendant claimed that they acted in good faith, making no effort to conceal this transaction, and intended that these legal services would ultimately benefit the bank by speeding the transfer of ownership of the bank (Tr. 726-728, 835). Similarly, petitioner did not deny the transaction charged in Count 10, in which he and Kaminski withdrew $12,000 from an account belonging to an insurance agency that was wholly owned by the bank. Instead, he again claimed that they

acted in good faith, making no effort to conceal the transaction; he asserted that he believed that the withdrawal of funds was permissible because he planned to use the funds to charter a bank holding company of which the bank could profitably become a part (Tr. 739-749).

The "innocent bystander" theory of defense that petitioner now appears to be espousing would not have been consistent with his own admissions at trial that he was fully involved in both these schemes. He cannot complain now that the jury chose to regard as fabrications his explanations of why he thought his actions were permissible because in the best interest of the bank (see 546 F.2d at 1321 n.7).

In sum, therefore, the government could and did fully bear any burden of showing "unlikelihood of prejudice" from joint representation even under the First Circuit's standard (*United States* v. *Foster*, *supra*). See also *United States* v. *DeBarry*, *supra*. As the court below noted (Pet. App. 3a):

> Petitioners have not pointed to a single instance before, during, or after trial when they were in positions adverse to one another. Both denied their guilt and neither fixed any blame on the other. Both testified and their testimony was similar and consistent. Their theories of defense were the same. No suggestion has been made that any other, perhaps incompatible, defenses existed or that any witnesses possessed information harmful to one and helpful to the other, so that counsel's examinations were hampered by divided loyalties.

2. Petitioner also contends (Pet. 19-27) that trial counsel's failure to move for a mistrial after dismissal of Count 1 and to make a timely motion for a new trial was so significant that it deprived petitioner of effective assistance of counsel. He argues that the jury could not have disregarded the first count in deciding the other counts, and therefore a competent counsel would necessarily have moved for mistrial when the first count was dismissed.

However, as the court below concluded (Pet. App. 5a), "[p]lausible strategic reasons existed for bypassing the [motion] for * * * a mistrial." The government's case suffered a serious setback when the first, and most significant, count was dismissed. Defense counsel had to decide at that time whether it was more advantageous to allow the government to proceed with its case, or to give the prosecution a fresh start at a second trial, at which time at least some of the Count 1 evidence would be admissible in any event. Fed. R. Evid. 404(b). Petitioner's counsel chose a reasonable alternative in proceeding to a verdict.

Petitioner argues (Pet. 25-26), however, that in light of other actions by counsel suggesting incompetence, one cannot conclude that counsel made a tactical choice in the present matter. But counsel, during final argument to the jury, specifically capitalized on dismissal of the first count (Tr. 1170-1171):

> [Y]ou see what happen[ed] to [that] accusation[]. Two weeks of trial! All of those people from Belfield paraded in here! And the Govern-

> ment sought, I think, to prove that Mr. Kaminski and [petitioner] cheated them. But those people got everything they were promised. They are now the owners of that Bank and their stock's worth $2,000 a share.
>
> Good character evidence.

Since counsel made full use of the government's failure to prove Count 1, suggesting that petitioner acted in good faith in the remaining transactions as well, it is reasonable to conclude that he intentionally proceeded to a verdict, rather than moving for a mistrial.

Petitioner also contends (Pet. 23-24) that counsel's failure to move for a new trial showed ineffective assistance of counsel because petitioner "lost forever the opportunity to have the trial court exercise its discretion as to whether the petitioner should receive a trial free of the taint of the Count 1 evidence" (Pet. 23). It is unlikely, however, that he was prejudiced by this failure by counsel. The jury was carefully instructed on two occasions to disregard any evidence that pertained only to Count 1 (Tr. 700, 1188). In addition, counsel and the court reviewed each Count 1 exhibit, and excluded all those Count 1 exhibits that were relevant only to Count 1 or that were merely cumulative of evidence already admitted with respect to the other counts (see Tr. 1042-1067). The jury is presumed to follow instructions, in the absence of convincing evidence to the contrary (*Opper* v. *United States*, 348 U.S. 84, 95 (1954)); and the jury here apparently did so, exercising independent judgment,

since they acquitted petitioner and Kaminski on a number of counts. On these facts, there is no reason to believe that petitioner would have been granted a new trial even if he had asked for one in a timely manner.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1979

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[4] The suggestion (Pet. 4, 25) that counsel failed, because of neglect or excessive drinking, adequately to prepare a defense has been rejected by both courts below (Pet. App. 4a-5a & n.1; 10a). As the court of appeals observed, "the trial judge who presided over the long proceedings and was in the best position to assess such a claim, ruled against petitioner[] on this issue" (Pet. App. 7a). The issue therefore does not warrant further review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This reply brief deals with certain arguments in the Brief in Opposition concerning (1) the importance under the circumstances of this case of the placement on the petitioner of the burden of proving prejudice resulting from his joint representation; and (2) the significance of the petitioner's counsel's failure to make timely motions for a mistrial and for a new trial.

1. The government concedes that the Circuits are in conflict regarding the proper placement of the burden of proof in joint representation cases. It does not dispute that the Eighth Circuit put the burden on the petitioner below even though he was not advised of the risks of joint representation by the trial court or his counsel. The Brief in Opposition claims, nonetheless, that this case is unworthy of this Court's consideration, asserting that the government "could and did bear any burden" of disproving prejudice to the petitioner. (Brief in Opposition, p. 8.) This assertion is flawed in several respects.

First, it rests on a flat misstatement of the nature of the conflict of interest between the petitioner and his co-defendant. The petitioner has not claimed, as the government suggests, that he had any affirmative interest in proving "aggravating circumstances" tending to inculpate his co-defendant. (Brief in Opposition, p. 7.) Rather, his interest was in stressing – through cross-examination, affirmative evidence and argument – circumstances tending to disprove elements of the offense of misapplication of bank funds. (See Petition at pp. 17-18.) Unfortunately, however, the petitioner's counsel could not stress these mitigating factors without also drawing the jury's attention to their inapplicability to the conduct of the petitioner's co-defendant. Separate counsel would not have labored under the same disadvantage.

Second, the government's assertion that it negated any likelihood of prejudice to the petitioner rests primarily on an analysis of the trial transcript. (Brief in Opposition, pp. 7-8.) However, as we pointed out in our Petition, at pp. 15-16, the record of a criminal trial will only rarely reflect the harm resulting from joint representation. The likelihood that the trial record may conceal prejudice to a

defendant is itself an important reason why the government should bear the burden of proof in this context.

Third, the government's position overlooks the indicia of prejudice which the record contains. Particularly striking, we submit, was the petitioner's counsel's suggestion during closing argument that the jury should not "compromise" its verdict by acquitting one co-defendant and convicting the other. See Petition, p. 18. In its Brief in Opposition, the government pointedly ignores this concrete evidence of prejudice to the petitioner.

In short, the government could not and did not sustain the burden of proving that the petitioner was not prejudiced by his counsel's effort to represent conflicting interests. Consequently, this case squarely presents the important question – over which the courts of appeals are still divided – of whether the defendant or the government should bear the burden of proof on the issues of conflict and prejudice arising out of joint representation when the defendant has not been warned of the risks of joint counsel and has not waived his Sixth Amendment rights.

2. The government relies on defense counsel's closing argument and the trial court's jury instructions in downplaying the significance of counsel's admitted failures to file timely motions for a mistrial and for a new trial. This reliance is misplaced.

Defense counsel's reference during closing argument to the dismissal of Count 1 is said to demonstrate that the failure to move for a mistrial was "tactical" or "intentional." (Brief in Opposition, pp. 9, 10.) But the issue is not whether the failure to move for a mistrial was intentional (as opposed to inadvertent), but whether it can be described as competent. In light of other aspects of

this attorney's performance in this case, we respectfully submit that no such conclusion can be drawn. Furthermore, the references by counsel during closing argument to the Count 1 evidence do not, as the government suggests, demonstrate that counsel saw a tactical advantage in foregoing a motion to sever. The jury had listened to 46 of the government's 53 witnesses testify solely about Count 1, and it was therefore obviously necessary that defense counsel deal with that evidence in some manner in his closing argument. The fact that counsel chose to tell the jury that this evidence should be viewed as favorable to his client did not make it so in the jury's mind.

According to the government, an instruction directing the jury to "disregard" the Count 1 evidence was sufficient to make it unlikely that prejudice resulted from the negligent failure to file a motion for a new trial. However, the court's instruction, twice repeated, was vague indeed. The jury was told only that it should "disregard all evidence received previously only insofar as that evidence deals with Count 1." This ambiguous phrasing left the jury free to consider the testimony of the government's 46 Count 1 witnesses in connection with the remaining counts, but did not explicitly limit its use to the narrow purposes permitted by the Federal Rules of Evidence. Such a charge was plainly insufficient to guard against prejudice. More to the point, however, the trial court was in the best position to determine the impact of the Count 1 evidence on the fairness of the petitioner's trial – and the adequacy of any curative instructions. Because petitioner's counsel failed to move for a mistrial or a new trial, the trial court never had the opportunity to make that determination. Counsel's failure to take necessary steps to protect his client from prejudice, we submit, deprived the petitioner of his Sixth Amendment rights.

Respectfully submitted,

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